IN THE MISSOURI SUPREME COURT

No. SC84131

BELINDA ULRICH WOODSON,
Respondent/Cross-Appellant,

v.

DENNIS EDWARD WOODSON,
Appellant/Cross-Respondent.

APPEAL FROM SIXTH JUDICIAL CIRCUIT COURT OF MISSOURI
Hon. Gary D. Witt, Judge

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT DENNIS E. WOODSON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

A. Constitutional Provisions

B. Court Decisions

C. Statutes and Court Rules

POINTS RELIED ON

HUSBAND'S APPEAL

I. THE TRIAL COURT ERRED IN TREATING WIFE'S MISSOURI STATE TEACHERS RETIREMENT ACCOUNT AS HER SEPARATE PROPERTY INSTEAD OF

MARITAL PROPERTY DIVISIBLE BY THE COURT FOR THE REASON THAT §169.572 RSMO 2000 WHICH SHIELDS SUCH ACCOUNT FROM DIVISION IS UNCONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE, WHERE PAYROLL DEDUCTIONS FOR SOCIAL SECURITY (FICA) WERE SIMULTANEOUSLY WITHHELD FROM WIFE'S SCHOOL DISTRICT SALARY, AND THE FAILURE TO DIVIDE THE ACCOUNT DEPRIVED HUSBAND OF PROPERTY WITHOUT DUE PROCESS OF LAW AND DENIED HIM THE EQUAL PROTECTION OF LAW UNDER THE U.S. AND MISSOURI CONSTITUTIONS.

ARGUMENT

HUSBAND'S APPEAL

I. THE TRIAL COURT ERRED IN TREATING WIFE'S MISSOURI STATE TEACHERS RETIREMENT ACCOUNT AS HER SEPARATE PROPERTY INSTEAD OF MARITAL PROPERTY DIVISIBLE BY THE COURT FOR THE REASON THAT §169.572 RSMO 2000 WHICH SHIELDS SUCH ACCOUNT FROM DIVISION IS

UNCONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE, WHERE PAYROLL DEDUCTIONS FOR SOCIAL SECURITY (FICA) WERE SIMULTANEOUSLY WITHHELD FROM WIFE'S SCHOOL DISTRICT SALARY, AND THE FAILURE TO DIVIDE THE ACCOUNT DEPRIVED HUSBAND OF PROPERTY WITHOUT DUE PROCESS OF LAW AND DENIED HIM THE EQUAL PROTECTION OF LAW UNDER THE U.S. AND MISSOURI CONSTITUTIONS.

STANDARD OF REVIEW

Wife's related assertions that §169.572 RSMo 2000 enjoys a presumption of constitutionality and is subject to the "rational basis" test for validity stem from her mistakenly narrow view of "fundamental rights" and her misreading of Stone v. City of Jefferson, 317 Mo. 1, 7, 293 S.W. 780, 782 (banc 1927), and the three U.S. Supreme Court decisions – now more than a century old – therein cited. Wife seems to argue that only *owners* of property, but not others, possess fundamental rights deserving of protection afforded by the 14th Amendment, because the plaintiff in Stone owned certain real estate. But the Stone Court's recitation of "fundamental rights" recognizes an obviously broader sweep that includes "the right to *acquire* . . . property." The 14th Amendment plainly protects from state infringement the rights of persons who do not own tangible property. Husband's right to acquire part of Wife's pension benefits or equivalent property is in the nature of a chose in action -- a right to receive or recover a debt, demand, or damages on a cause of action *ex contractu*. Rotert v. Faulkner, 660 S.W.2d 463, 469 fn.10 (Mo.App.S.D. 1983). It is an intangible interest in personal property that has long enjoyed protection of the Due Process and Equal Protection Clauses. *See* Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 485, 108 S.Ct. 1340, 1345, 99 L.Ed.2d 565 (1988) ("Appellant's interest is an unsecured

claim, a cause of action against the estate for an unpaid bill. Little doubt remains that such an intangible interest is property protected by the Fourteenth Amendment."); Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-31, 102 S.Ct. 1148, 1154-5, 71 L.Ed.2d 265 (1982) (and cases cited); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950) (holding that cause of action is species of property protected by 14th Amendment's Due Process Clause).

Additionally, Wife seems to argue (Resp.Rep.Br. 6-7) that neither the Due Process Clause nor the Equal Protection Clause affords protection to Husband inasmuch as "property rights" were not included in the list of "fundamental rights" mentioned in Cas. Reciprocal v. Mo. Emp. Mut. Ins. Co., 956 S.W.2d 249, 257 (Mo.banc 1997). "A fundamental right . . . is a right 'explicitly or implicitly guaranteed by the Constitution.'" Mahoney v. Doerhoff Surgical Services, Inc., 807 S.W.2d 503, 512 (Mo.banc 1991), quoting San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33-34, 93 S.Ct. 1278, 1296-7, 36 L.Ed.2d 16 (1972). The Due Process Clause of the 14th Amendment explicitly guarantees that "No state shall . . . deprive any person of . . . property, without the due process of law." The Missouri Constitution's counterpart in Art. I §10 is nearly identical. And as noted above, property rights have been denominated "fundamental" by the U.S. Supreme Court for over a century.

Consequently, under the controlling decisions in Washington v. Glucksberg, 521 U.S. 702, 720, 117 S.Ct. 2258, 2268, 138 L.Ed.2d 772 (1997), and Reno v. Flores, 507 U.S. 292, 301-2, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1 (1993), the statute as applied to the facts of this case is subjected to strict constitutional scrutiny and can be upheld only if narrowly tailored to serve a compelling state interest.[1]

[1]The appellant in Silcox v. Silcox, 6 S.W.3d 899 (Mo.banc 1999), evidently did not argue that the

Moreover, the act is presumptively unconstitutional because it impinges upon fundamental rights, in accordance with Harris v. McCrae, 448 U.S. 297, 312, 100 S.Ct. 2671, 2685, 65 L.Ed.2d 784 (1980) ("It is well settled that, . . . if a law 'impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional'") (citation omitted), and Mahoney v. Doerhoff Surgical Services, Inc., supra 807 S.W.2d at 512 (same).

DISCUSSION

A. *Husband Has A Protectible Property Interest In The Pension*. Wife's next argument is a classic example of circular reasoning: Husband has no protectible interest in Wife's state teachers retirement account because the very statute under attack precludes its classification as marital property, thus depriving him of that interest. In other words, the statute itself takes away his standing to challenge the constitutionality of the statute. The fallacy in that reasoning is self-evident. If it were to be adopted, no

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statute should be subjected to heightened scrutiny for equal protection purposes. Id. at 903. This Court actually sidestepped the constitutional standard of review issue because the appellant lacked standing to raise such claim. Id. In *obiter dictum*, it stated that the "rational basis" test was appropriate, although the opinion recognized in a footnote that strict scrutiny applies where a statute infringes upon a fundamental right. Id. at 903 and n. 15. However, nothing in the Silcox decision indicates this Court considered the statute in light of its impact upon the "fundamental right" to acquire, own, enjoy and dispose of property. Husband concedes that, in a typical situation where the employee spouse *does not* contribute to Social Security but has paid into the state teachers retirement account in lieu thereof, §169.572 *on its face* should survive strict scrutiny. That is not the situation here, however.

statute taking away property rights could ever be challenged as unconstitutional.

But for §169.572, and certainly prior to its enactment in 1991, Husband did have an interest in that account from the first contribution, protectible in a dissolution proceeding regardless of how the account was titled. Wife began paying into the state teachers retirement account in 1984 during the parties' marriage (Tr. 39-41).[2] This Court has recognized "the fact that many potential pension benefits have been and will be created by the joint efforts of both spouses and may be treated as 'marital property.'" Kuchta v. Kuchta, 636 S.W.2d 663, 665 (Mo.banc 1982).

Since 1973, and certainly during the 1984-1991 period while contributions were being made to that account, §452.330.3 RSMo of the Dissolution of Marriage Act has consistently provided that such an account was presumptively a marital asset subject to division by the court. Indeed, not only could the non-employee spouse enforce the right to compel the courts to consider the value of the employed spouse's pension benefits and divide it, Schulz v. Schulz, 612 S.W.2d 380, 382 (Mo.App.E.D. 1980); but the courts themselves had the *special duty* to do so in fashioning a just and equitable division of assets. Houchins v. Houchins, 727 S.W.2d 181, 184 (Mo.App.W.D. 1987).

And finally, in adopting §169.572 in its present form in 1991, the General Assembly repealed former §169.142 which expressly authorized "a court of competent jurisdiction [to] divide the pension, annuity, benefits, rights, and retirement allowance provided pursuant to this chapter . . . to the same extent and in the same manner the court may divide the marital property of the parties." *See* Mallams v. Mallams,

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[2] Although she began teaching in 1972, when Wife left the job market to raise children in 1977, she "took [her teachers] retirement out" (Tr. 39). She returned to teaching in 1984.

861 S.W.2d 822, 823 (Mo.App.W.D. 1993).

Consequently, a party's right to seek either a portion of the other spouse's pension or some other items as a compensating allowance is a property interest, grounded in state law, sufficient to command the protections of the 14th Amendment from state infringement.[3]

B. *The Statute Does Not Serve Any Legitimate State Interest In This Situation*. Husband concedes that protecting the pension rights of teachers who do not participate in the Social Security system would serve a legitimate, even *compelling* state interest, had the Silcox Court so found. But Husband does not seek to strike down §169.572 as unconstitutional on its face. It is a commendable piece of legislation that serves the stated purpose in the vast majority of situations -- but not this one, as the trial court correctly observed (LF 110).

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[3]Wife also asserts that Husband's interest in the state teachers retirement account "does not amount to an 'inherent right' to its classification as marital property," citing Stone v. City of Jefferson, supra (Resp.Reply Br. 6). Stone involved the plaintiff's claim that a statute was invalid because it did not provide a right to protest, or object to, the decision of a third class city's right to assess abutting landowners to pay for street improvements. Stone held that, since the city could make such improvements without the consent of landowners -- they have no "right" to consent -- *a fortiori* it was not constitutionally required to provide the "preliminary and less effective resort to" the "privilege of protest" of the city's assessment. 293 S.W. at 781-2. Stone does not support Wife's argument -- it expressly noted that the "privilege of protest" is not the constitutional equivalent of the "fundamental rights . . . to acquire, hold, enjoy, and dispose of property." Id. at 782.

Wife argues (Resp.Rep.Br. 8) that the statute serves another purpose identified in Waggoner v. Waggoner, Ky., 846 S.W.2d 704 (banc 1992) -- *i.e.*, to attract and retain teachers. There, the Kentucky supreme court upheld a statute similar to §169.572 that was broadly challenged as impermissible special legislation and as violative of equal protection in a discovery dispute in a dissolution proceeding. In Kentucky, teachers are "excluded from participating in the Social Security program because they [are] covered by the [state Teachers Retirement Act]," id. at 707, and the wife had "mandatorily contributed to the TRS toward her retirement" for 36 years, id. at 706.

The legislative purposes identified in Waggoner (affording retired teachers the substantial equivalent of Social Security retirement benefits, just as in Silcox, and thus to attract and retain teachers, id. at 707, 708) are significant in deciding whether §169.572 is unconstitutional on its face. But Wife's argument is simply irrelevant *in light of the facts of this case*. Neither rationale is served where the teacher simultaneously contributes the mandatory amount to a Social Security retirement fund: first, because the teacher already is fully protected in her retirement by Social Security benefits; and second, because the existence of Social Security coverage and future benefits is adequate incentive to attract and retain teachers (to the same extent that it is with most other occupations of equal or greater importance to the commonweal).

The legislative classification *as applied to the facts of this case* simply does not bear "a reasonable and just relation" to these stated purposes. Kansas City v. Webb, 484 S.W.2d 817, 824 (Mo.banc 1972). Exempting the state teachers retirement account from the category of divisible marital property where the teacher is already fully covered by Social Security is arbitrary and unreasonable in that it does not correct any discernable harm or evil. And it is singularly unjust to Husband by placing him in

a unique and arbitrary classification in which a party's spouse has not one but *two* separate and distinct retirement accounts (both acquired during the marriage) that have been legislatively classified as her non-marital property beyond the court's power to divide fairly and justly, even though participation in the state teachers retirement fund was generally anticipated as a substitute for participation in the Social Security system.[4] Thus, as applied, §169.572 violates the 14th Amendment's due process and equal protection clauses and their counterparts in Art. I, §2 and §10 of the Missouri Constitution.

C. *The Trial Court Did Not Disregard The Statute And Divide Wife's Pension*. Nothing in the record supports the Wife's assertion (Resp.Rep.Br. 9) that, despite the constraints of §169.572, the trial court actually did award Husband an interest in the state teachers retirement account.

Wife argues that only an improper division of that retirement account can explain the "substantially higher percentage" of the marital property awarded to Husband in view of his alleged misconduct (Resp.Rep.Br. 9). On the contrary, the evidence as to any misconduct was hotly disputed (Tr. 151-2, 155-6, 180-1, 193-4), and even Wife's evidence demonstrated that Husband's alleged abusive behavior occurred only after Wife filed for dissolution (Tr. 24-5, 27-9). The court was free to reject Wife's testimony. T.B.G. v. C.A.G., 772 S.W.2d 653, 654 (Mo.banc 1989). It made no findings whatsoever

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[4]*See* Chapter 169 RSMo generally. After the Social Security Act was amended to allow states to enter into a voluntary agreement to provide Social Security coverage for their employees, the General Assembly enacted §105.310 RSMo 2000 enabling state officials to enter into such an agreement with HHS, and §105.353.3 RSMo 2000, which allowed employees of the public school retirement system to vote to be included under an agreement for Social Security coverage.

that Husband engaged in either significant behavioral misconduct or financial misconduct -- not as to the $15,340 in cash secreted in their house which he awarded to Husband (LF 115 #12), nor even with respect to the non-reporting of income on tax returns (a joint decision by Husband and Wife, incidentally, Tr. 71-3, 172) since the court merely saddled Husband with any future tax liability without finding he had a legal duty to report the income to the IRS (*see* LF 109, 117).

Wife assiduously ignores other factors warranting the property division, including Husband's age and poor health (Tr. 84, 177, 182), his work history, earnings capacity and anticipated obligations (Tr. 83-4, 155-6), their earnings disparity (Tr. 76-7, 161), his child support obligation (LF 123), and his potential retirement benefits (Tr. 42-8; LF 115).

Suffice it to say that the judgment entry declares the court's finding that the state teachers retirement fund was non-marital in accordance with §169.572, and thus not divisible, and ordered the entire amount set over to Wife (LF 109, 112-3 #30). Moreover, the court made this explicit finding (LF 110): "

> the value of the non-marital retirement is a factor in determining the division of the remaining marital property in this case."

Husband has indisputably been harmed by application of the statute in this dissolution proceeding.

CONCLUSION

For the foregoing reasons, the Court should reverse the Judgment Decree because §169.572 RSMo is unconstitutional as applied to the facts of this case, and remand the cause for reconsideration of the division of marital property.

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CERTIFICATE OF COMPLIANCE WITH
RULE 84.06(C) AND OF SERVICE

Pursuant to Rule 84.06(c), I hereby certify that the foregoing Brief fully complies with the provisions of Rule 55.03(a) and (b); that it contains 3162 words/344 lines and complies with the word/line limitations contained in Rule 84.06(b); that a diskette of the Brief is included herewith in WordPerfect 5.1 format; that the diskette was scanned for virus using McAffee virus scan and found to be free of virus; and that one copy of the diskette and one copy of Respondent's Brief were mailed, by U.S. Mail, postage prepaid, this ____ day of September, 2002, to Michael J. Svetlic, 5716 N. Broadway, Kansas City, MO 64118.

_____
James D. Boggs